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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. ...502

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Brotherhood of Railroad Trainmen prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 12, 1967, petition for rehearing denied June 7, 1967.

OPINIONS BELOW.

The opinion of the District Court is not reported. It appears at R. 119-21 below. The opinion of the Court of Appeals (Appendix A, *infra*) is not yet officially reported. It is unofficially reported at 65 L. R. R. M. 2257. It is appended hereto as Appendix A.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered May 12, 1967 (R. 200), and is appended hereto as Appendix B, *infra*. A petition for rehearing was filed May 26, 1967, and was denied June 7, 1967 (Appendix C). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). (Appendix D.)

QUESTIONS PRESENTED.

1. Whether the arbitration board created by Public Law 88-108 to arbitrate and resolve two railroad "work rules" disputes, still exists and retains jurisdiction for the purpose of ruling on disputes over the interpretation or application of its award, even though the statute creating it by its own terms has expired.

2. If the answer to Question 1 is in the negative, whether the respondent violated the award of the arbitration board in depriving certain employees of employment under certain conditions. The District Court held that the award and prior interpretations raised a "necessary inference" that respondent's action was authorized; the Court of Appeals disagreed but did not rule on the validity of respondent's conduct, holding that the question should be submitted to the arbitration board and that the board retained power to pass on it.

(The Court below did not pass on this second question. If the writ is granted and this Court holds that the arbi-

tration board established by the expired statute no longer has power to issue rulings, this Court may either itself adjudicate Question 2 or remand it to the Court of Appeals for adjudication.)

STATUTES INVOLVED.

The pertinent provisions of Public Law 88-108 (77 Stat. 132; 45 U. S. C. (Supp.), § 157) and the Railway Labor Act (45 U. S. C., §§ 151 et seq.) are set forth in Appendix D, *infra*.

STATEMENT.

On August 28, 1963, Congress enacted Public Law 88-108 providing for compulsory arbitration of two "work rules" disputes on the railroads, the "firemen on diesels" issue and the "crew-consist" issue. It is the latter issue that is here involved. It pertains to the minimum size of crews in train service and in switching service, not including engine service. The Act established an arbitration board (subsequently known as "Arbitration Board No. 282") which made an award to take effect January 25, 1964, and to remain in effect for two years, pursuant to the provisions of Sections 4 and 5 of Public Law 88-108. The Act provided that the award should remain in effect for such period as the arbitration board should determine, not exceeding two years (Sec. 4). The Act also provided (Sec. 8) that the Act should expire 180 days after its enactment except that it should remain in effect for the purposes of Section 4 for the period provided for in Section 4 (two years from January 25, 1964).

The award made provision for reductions in crew consist but provided employment protection for "protected employees" as defined therein. The Act provided that the arbitration should be conducted in accordance with Sections 7 and 8 of the Railway Labor Act. The board

was reconvened from time to time during the two-year period to issue interpretations of its award.

Pursuant to Public Law 88-108 the District Court entered an order making the award the judgment of the Court. On January 17, 1966, petitioner filed in that case in the District Court a motion for supplemental relief against respondent railroad, urging that respondent had violated the award by depriving "protected employees" of employment guaranteed by the award by operating with reduced crews other than when permitted by the award (R. 20-21). The District Court denied the motion on the ground that there was a "necessary inference or implication" from prior interpretations of the board that the carrier was authorized by the award to do what it did (R. 120, 184).

The Court of Appeals disagreed that there was such necessary inference. But it affirmed the denial of the motion for supplemental relief on the ground that the issue was one within "the specialized background of knowledge, experience, and understanding of the Board" (R. 186) and that the issue called for "the sensitized judgment, enlightened by prior experience in comparable situations, of the Arbitration Bo rd" (R. 188). It held that although the award of the board and the statute that created the board and provided for its functioning had both expired, the board "retains similar power to pass upon differences arising out of the contentions of these parties as to the meaning of application" of the award with respect to action taken during the period of the award (R. 189; Appendix A, p. 10a). The question of the continuing jurisdiction of the arbitration board to make such adjudications after the expiration of the statute creating it was not briefed or argued but arose during oral argument in the Court below. A petition for rehearing was filed on that ground, but was denied (Appendix C, p. 11a).

REASONS FOR GRANTING THE WRIT.

The decision below raises far-reaching questions not only about the continued existence and jurisdiction of the arbitration board after the expiration of the Act of Congress that established it, but by necessary implication the continued existence and authority to function of any agency of the United States after the expiration of the statute establishing the agency. In effect, it holds that when Congress creates an agency with a limited life, under a statute with a limited life having an automatic expiration date, to make specified adjudications, the agency continues to exist for the purpose of making such adjudications of disputes after the period of the life of the statute.

The only authority the Arbitration Board has, to do anything, is Public Law 88-108 which established it and prescribed what it was to do and how it was to do it. But that Law by its own terms has long since expired, and so any authority the arbitration board has, to do anything, is under a statute that is no longer operative. Yet the Court below held that such agency may continue to function.

There have been, of course, and are, many disputes over the proper application of the award of the arbitration board. Many were submitted to it during its life, and many were decided during its life. It has not decided any since its expiration, and those submitted to it during its life and not decided, and others, remain undecided.

The Court below would have Arbitration Board 282 continue to exist as long as there may be a "controversy over the meaning or application" of its award for it to "pass upon" under Section 7 Third (c) and Section 8 (m) of the Railway Labor Act (App. D, p. 12a). That Congress did not so intend is attested by the following provisions of Public Law 88-108. It did not create Board 282 as a continuing agency of the United States like the

Interstate Commerce Commission, the National Mediation Board, etc. It was created as a board of seven persons to accomplish a single purpose, i. e., to make a final decision as to the disposition to be made of two disputes which existed under the Railway Labor Act as a result of two specific notices, "the carriers' notices of November 2, 1959" and the "organizations' notices of September 7, 1960" as subsequently implemented. Sections 2 and 3, Public Law 88-108 (App. D, p. 13a). It was required to do so within ninety (90) days. Section 5, Public Law 88-108 (App. D, p. 14a). The law itself expired 180 days after it was enacted, except for such additional time as might be necessary to sustain the award of the arbitration board for which it provided, but not to exceed two years from the effective date of the award. Sections 4, 5 and 8, Public Law 88-108 (App. D, pp. 13a and 14a).

Public Law 88-108 provided that the arbitration board should, to the extent not inconsistent with that statute, conduct its proceedings in accordance with Section 7 of the Railway Labor Act, and Section 7 Third (c) of that Act provides for an arbitration board established by agreement to issue interpretations of its award. To that extent, it may be argued that Public Law 88-108 "incorporates" Section 7 of the Railway Labor Act and the Railway Labor Act, it may be argued, has not expired. But any such authority, arising from "incorporation" of a part of the Railway Labor Act, must have expired with the expiration of the incorporating statute.

The very same Court below, under the very same statute here involved, has decided that no further steps may be taken under the statute and award to eliminate further jobs. Indeed, it held that procedures initiated during the life of the award, under procedures established by the award to reduce the size of crews, could not be continued after the expiration of the award, for after that time there was no authority for further affirmative action under the award. *Brotherhood of Railroad Trainmen, et al. v.*

Akron & Barberton Belt R. Co., et al., Nos. 20,102 etc., decided May 12, 1967, the same day as the decision below in this case, by a different division of that Court, Supplemented July 31, 1967. (Not yet reported, affirming on this issue, 250 F. Supp. 691, 696-7 (1966).) It is difficult to understand why some procedures under an expired statute and its award have expired with the expiration of the statute and award even though initiated during their life, while other procedures may still be utilized even though not yet initiated,—at least in the absence of explicit statutory differentiation, of which there is none here involved.

It has been repeatedly held that the jurisdiction of a tribunal established by Congress, including a court, expires with the expiration of the statute establishing it, at least in the absence of an express savings clause. *Ex Parte McCardle*, 7 Wallace 506 (1869); *Carpenter v. Wabash Ry.*, 309 U. S. 23 (1940); *Hines v. Davidowitz*, 312 U. S. 52 (1941); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Bruner v. United States*, 343 U. S. 112 (1952); *Brotherhood of Railroad Trainmen v. Denver & Rio Grande Western R. R.*, 370 F. 2d 833 (10th Cir. 1966), cert. den., April 24, 1967 (35 Law Week 3375). Here of course there is no savings clause. Savings clauses apply to cases then pending, and here there was no proceeding pending before the board upon the expiration of the statute. In the case last cited, and some of the others, the District Court had jurisdiction to do what it did when it did it, but the Court of Appeals held that what the District Court did was a nullity because pending appeal that jurisdiction of the District Court had expired, and this Court denied a petition for a writ of certiorari. The decision below in this case flies in the teeth of the teaching of those cases. Also, in those cases the tribunal continued to exist but its jurisdiction of the subject matter terminated. Here, the statute authorizing the tribunal to exist itself has expired.

So long as the decision below stands unreviewed by this Court, there can be nothing but chaos concerning the authority of a tribunal to exercise jurisdiction under an Act of Congress conferring jurisdiction after the termination of the statute conferring the jurisdiction. We suggest that the decision below in this case, creating the problem, is the decision to be reviewed else chaos reign on this subject for an indeterminable period.

Of even more immediacy, if the decision below is not reviewed and the arbitration board resumes and continues issuing interpretations as the Court below held it must, and it is later held that the board had no jurisdiction because both it and the enabling statute had expired, the rights of thousands of railroad employees and numerous railroads would probably have been irretrievably damaged.

It is urged that this petition for a writ of certiorari be granted.

Respectfully submitted,

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